

6 Official Opinions of the Compliance Board 187 (2009)

Minutes – Procedures – Practice in Violation – Failure to approve
Minutes – Procedures – No obligation to post minutes on website

October 27, 2009

Janis Zink Sartucci

The Open Meetings Compliance Board has considered your complaints concerning access to minutes for retreats held by the Board of Education for Montgomery County (“County Board”). Specifically, you initially alleged that minutes were not available for specified dates. In subsequent letters, you alleged that the copies of minutes provided to you failed to satisfy the Open Meetings Act in that the documents were merely drafts which had never been approved by the County Board.

We find that certain items considered during the course of retreats of the County Board were subject to the Open Meetings Act; minutes for those retreats were required. While minutes were prepared, the minutes were deficient in that they lacked the County Board’s approval.

I

Complaint and Response; Supplemental Record

Your complaint consisted of a series of letters related to County Board retreats on the following dates: January 18, 2007, June 24, 2008, October 6, 2008, January 26 and 27, 2009, and May 8, 2009. Initially, your complaint suggested that minutes for these meetings were not publicly available, premised on the fact that the documents had not been posted on the County Board’s website and your request for copies of the minutes had “gone unanswered.” Subsequently, you acknowledged receipt of “alleged minutes” for the above dates, other than May 8, 2009, as well as minutes for May 31, 2007, which were provided in response to a separate request. However, the complaint alleged that the documents had never been approved by the County Board and that no minutes for May 8, 2009, were provided. In the last of your series of letters, you alleged that the draft minutes reveal that votes were taken “on matters that concerned public business such as the school system’s strategic plan, core values, function of board committees and public comment

process for board meetings.” Specific matters appear to have been discussed and policies changed “without the public ever having access to the minutes from these retreats and, therefore, without any ability to review the public business that was transacted by the [County Board.]” You included copies of the available minutes for our review.

In a timely response on behalf of the County Board, Judith Bresler, Esquire, stated that the complainant had requested copies of minutes from five of the retreats list above. However, minutes for May 8, 2009, were never requested. The request was made by an e-mail sent to Ronald Ikheloa, the County Board’s Chief of Staff, on Monday May 11, 2009. Two days later, Mr. Ikheloa responded that he would try to provide the documents by the end of the week. On Monday, May 18, 2009, Mr. Ikheloa provided the minutes for the meetings actually requested. Ms. Bresler also argued that a complaint alleging the failure to provide minutes of a meeting would be governed by the Public Information Act rather than the Open Meetings Act and that the County Board would have up to 30 days to locate and provide public records. In summary, the response argued the complaint was baseless.

On receipt of your supplemental letters, Ms. Bresler supplemented the County Board’s response and reiterated that a copy of minutes for May 8, 2009, was never requested. With respect to the question whether the retreats were covered by the Open Meetings Act, she correctly stated, “[t]he critical issue is whether the quorum convened for the consideration or transaction of public business, making it subject to [the Open Meetings Act], or whether the quorum convened for the purpose of team building, reviewing the efficiency of internal operations, or other administrative function that is not subject to the procedural requirements of the [Act].”

The County Board’s position is that the vast majority of topics discussed during retreats involved “internal operating procedures” rather than policy matters, and, citing 3 *OMCB Opinions* 39, 43 (2000), suggested that “housekeeping” matters have been held to fall under the administrative function exclusion of the Act. Other topics involved interpersonal relations among members. When suggestions were made that consideration be given to incorporating certain concepts into the strategic plan, no action was taken; instead, the matters were referred to a committee of the County Board. The response denies the allegation that “policies were changed” during the course of retreats. The response stated that the fact retreats are open to the public or that minutes are maintained does not mean the retreats are governed by the Act.

II

Analysis

A. Application of Act

The initial issue we must consider is whether the County Board's retreats were outside the scope of the Act. In this regard, the key questions are whether the meetings involved the consideration or transaction of public business, §10-502(g),¹ and whether the topics involved administrative functions to which the Act does not apply. §10-503(a)(1)(i). Because these sessions apparently were open to the public and the Act's procedural requirements apparently were followed in conducting the sessions, this issue may appear largely academic. Nevertheless, the issue is significant for the purpose of determining whether we should evaluate the adequacy of the minutes for the retreats.

The test of whether a matter qualifies as an administrative function was correctly stated in the County Board's response. *See, e.g., 6 OMCB Opinions* 145, 147-48 (2009) (two-step analysis applicable to administrative function determination). We agree with the County Board that certain matters addressed during retreats are not subject to the Act, such as team building exercises, and that certain housekeeping matters would qualify as administrative functions. *See, e.g., 3 OMCB Opinions* 274 (2003); *3 OMCB Opinions* 39, 43 (2000). However, we do not agree that every matter considered during the retreats fell outside the scope of the Act. Given that the focus of the complaint is on the adequacy of minutes, it is not necessary that we evaluate each item considered during the course of the numerous retreats. Rather, we limit our discussion, focusing for illustrative purposes on two items considered during the course of the County Board's retreats which, in our view, were governed by the Act.

Discussion of whether changes were appropriate in the school system's existing strategic plan, even though the final decision was to defer to a committee to consider rewording, (January 18, 2007), would not fall outside the scope of the Act. The discussion clearly involved public business. And it did not constitute an administrative function. While we appreciate the role that committees play in the County Board's work, a discussion by the County Board at a retreat as to whether a policy ought to be referred to a committee for its consideration and a recommendation back to the full County Board is subject to the Open Meetings Act. The Act extends to each step of the

¹ All statutory references are to the Open Meetings Act, Title 10, Subtitle 5 of the State Government Article, Annotated Code of Maryland.

deliberative process. *City of New Carrollton v. Rogers*, 287 Md. 56, 72 (1980); 4 *OMCB Opinions* 122, 124 (2005). The deliberative process starts with the question of whether a potential policy change is ripe for discussion. 1 *OMCB Opinions* 157, 159 (1996) (legislative process begins with decision to put matter on agenda). Here, preliminary discussions occurred about potential changes to the County Board's plan and referral to committee.

Similarly, a change in the County Board's policy as to its public comment period during its meetings (May 31, 2007), presented as a "housekeeping matter," does not qualify as an administrative function outside the scope of the Act. *See, e.g.*, 1 *OMCB Opinions* 113, 115 (1995) (public body's discussion regarding how it might accommodate request from visitor to address body during meeting not outside scope of the Act). This discussion involved a policy decision affecting the public.

To the extent that retreats were governed by the Act, the allegations pertaining to minutes are properly before us.²

B. Access to Minutes

In General

The Open Meetings Act requires that minutes be prepared for every meeting governed by the Act, even if the meeting was limited to procedural matters. 5 *OMCB Opinions* 50, 53 (2006). At a minimum, the minutes must reflect the information required under §10-509(c). To qualify as minutes of the public body, the public body must approve them. 3 *OMCB Opinions* 303, 306 (2003).

The Act makes clear that minutes of open meetings that are governed by the Act are "public records and ... open to public inspection during ordinary business hours." §10-509(d). Thus, the right of public access to minutes of such meetings derives from the Act itself. *Cf.* 6 *OMCB Opinions* 164, 169 n. 6 (2009). However, there is no requirement that a public body make minutes of its meetings available on a website.

² Access to records other than those required under the Act, including minutes for meetings not governed by the Act, is governed by other law, namely the Public Information Act – a matter beyond our jurisdiction. *See, e.g.*, 5 *OMCB Opinions* 1 n. 2 (2000).

Complainant's request for access

As to the allegation that the County Board failed to provide public access to minutes in a timely manner, we find that no violation occurred. As noted above, the County Board is not required to post minutes on its website. Thus, the fact that minutes of regular meetings are posted, but not minutes of retreats, does not violate the Act.

We do not know whether immediate access to the minutes would have been available had the complainant visited the County Board's office. The minutes were not requested in that manner. Rather, the request was made by an e-mail communication sent to the County Board's chief of staff, who responded two days later, and provided the requested documents the following Monday. This appears to be a reasonably prompt response to such a request.

Absence of County Board approval

Minutes of any retreat that was subject to the Act required County Board approval. As we have previously noted, "[a]s a legal matter, the minutes of a public body become such only after the public body itself has had an opportunity to review and correct the work of whoever prepared them." 3 *OMCB Opinions* at 306 (internal citation and quotations omitted). "Absent approval ... it cannot be said that the minutes ... are truly the minutes of the [public body.]" *Id.* The County Board does not appear to contest the fact that the minutes were not formally adopted. Thus, as to retreats that were governed by the Act, we find that the minutes were deficient in that the County Board never approved them.

III**Conclusion**

Certain items considered during the course of retreats of the County Board were subject to the Open Meetings Act; minutes for those retreats were required. While minutes were prepared, the minutes were deficient in that they lacked the County Board's approval.

OPEN MEETINGS COMPLIANCE BOARD

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